

PERCEPTUAL BIASES OF MEDIA HARMS & CRIES FOR GOVERNMENT CENSORSHIP

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[I]t is difficult to find a censor who will admit to having been adversely affected by the information whose dissemination is to be prohibited. Even the censor's friends are usually safe from pollution. It is the general public that must be protected.¹

A primary issue in First Amendment² jurisprudence is determining when harm caused by expression is sufficient to abridge an individual's or entity's freedom of speech.³ Because an "absolutist" interpretation of the First Amendment never has been adopted by the United States Supreme Court,⁴ "[l]ine drawing is inevitable as to what

speech will be protected."⁵ Courts must strike a balance between the values of freedom of expression⁶ and the government's regulatory interest in punishing or stopping speech.⁷

The government's interest inevitably involves either preventing or compensating for harm allegedly caused by speech.⁸ Libel law, for instance, compensates for reputational harm allegedly caused by defamatory falsehoods.⁹ Indecent broadcast speech is regulated because of the harm it allegedly causes children.¹⁰ Televised

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¹ W. Phillips Davison, *The Third-Person Effect in Communication*, 47 PUB. OPINION Q. 1, 14 (1983).

² The First Amendment to the United States Constitution provides in relevant part that Congress shall make no law abridging the freedom of speech or of the press. U.S. CONST. amend. I. The Free Speech and Free Press Clauses are incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local governments. U.S. CONST. amend. XIV; *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

³ See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 4 (1992) (stating that "we ponder when it is appropriate for the state to control public discourse for the perceived greater good").

⁴ Despite the literal language of the First Amendment that suggests that Congress can never make any law abridging freedom of speech, "[t]he fact is that First Amendment law is far more complex than the Constitution's command." JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* 169 (2d ed. 1996). "Although the First Amendment is written in absolute language that Congress shall make 'no law,' the Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression." ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 750 (1997).

⁵ CHERMERINSKY, *supra* note 4, at 751. Bollinger observes that "since no one has ever been willing to contend that every speech act under all circumstances should be protected, we

must necessarily embark on a decisional process of exclusion and inclusion for which we very quickly find we need some theoretical guidance beyond what the language itself offers." LEE C. BOLLINGER, *THE TOLERANT SOCIETY, FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 5-6 (1986).

⁶ Traditional values of free expression embodied in First Amendment jurisprudence range from discovery of the truth and promoting democratic self-governance to self-realization and self-fulfillment. See generally THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 3-15 (1966) (describing the functions of freedom of expression in a democratic society and identifying individual self-fulfillment, attainment of the truth, participation in decision-making, and balancing stability and change as values of free speech). It has been observed that "[a]cceptance of one rationale need not bump another from the list, as if this were First Amendment musical chairs." SMOLLA, *supra* note 3, at 5.

⁷ See Laurence Tribe, *American Constitutional Law* 792 (2d ed. 1988). In striking that balance, the dominant First Amendment ideology is that "[h]urtful speech might conceivably be of some value to society and therefore the proper answer to that speech is not censorship, but more speech." David S. Allen, *Freeing the First Amendment: An Introduction*, in *FREEDOM OF THE FIRST AMENDMENT* 3, 4 (David S. Allen & Robert Jensen eds., 1995).

⁸ See HARRY WHITE, *ANATOMY OF CENSORSHIP: WHY THE CENSORS HAVE IT WRONG* 41 (1997) (observing that the rationale "[t]hat certain expression needs to be prohibited because of the harm it causes remains for many the censors (sic) most powerful and compelling argument").

⁹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

¹⁰ See *Action for Children's Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995) (holding that the government "has an independent and compelling interest in preventing mi-

images of violence are regulated in the name of reducing aggressive behavior and real-life violence.¹¹ Efforts are made to regulate pornography because of the harm it causes women and society.¹² Cigarette advertising is restricted in the name of preventing teens from starting the harmful behavior of smoking.¹³

As a society, we fear the harmful effects of these and other media-propagated images.¹⁴ Susceptibility to the influence of mass media messages is, after all, a quality that we intuitively and readily ascribe to others.¹⁵ We often develop, in turn, laws based on our beliefs and assumptions about the harmful effects of media messages on others.

But what if our beliefs and perceptions about alleged media harms are systematically wrong? What if we, in fact, typically overestimate the harm caused by mass media messages? What if we unnecessarily censor speech?

There is a strong and growing body of empirical social science research from the field of communication that suggests that much of our First Amendment jurisprudence and efforts to censor speech may be radically off base. Specifically, the research supports what has been called the third-person effect hypothesis.¹⁶

The hypothesis "predicts that people will tend to overestimate the influence that mass communications have on the attitudes and behavior of

others."¹⁷ Parsed differently, the hypothesis, as originally articulated in 1983 by W. Phillips Davison, holds that "[i]n the view of those trying to evaluate the effects of a communication, its greatest impact will not be on 'me' or 'you,' but on 'them'—the third persons."¹⁸

Now, 15 years and many empirical experiments and studies later, evidence supports this hypothesis.¹⁹ That evidence has disturbing ramifications for extant and future First Amendment jurisprudence. It suggests the government may be unnecessarily censoring speech based on a perceptual bias about its effects on others.

An example—censorship of sexually explicit speech—makes the danger clear. Empirical research suggests that people systematically judge others to be more negatively influenced by pornography than themselves.²⁰ In turn, people "favor restrictions on pornography in line with their perceptions of effects on others."²¹ This is important because some experimental research also suggests that people systematically overestimate media effects on others.²² The ramifications, communication researcher Albert C. Gunther of the University of Wisconsin-Madison notes, are profound – "if people are systematically overestimating the negative social-level effects of pornography, then the third-person effect may be inflating opinion in favor of censorship."²³

nors from being exposed to indecent broadcasts").

¹¹ The Parental Choice in Television Programming section of the Telecommunications Act of 1996 calls for the establishment of a television ratings code for programs that contain violent or sexual content. See 47 U.S.C. § 303(w) (Supp. 1997). See generally Marci A. Hamilton, *Reconceptualizing Ratings: From Censorship to Marketplace*, 15 CARDOZO ARTS & ENT. L.J. 403 (1997) (describing the Parental Choice in Telecommunications Programming section and alternatives to it).

¹² See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985).

¹³ See 21 C.F.R. § 897.2 (1997). In April, 1997, a federal district court judge ruled that although the FDA had jurisdiction over tobacco products, it was beyond the scope of its authority to enforce the new advertising regulations. See John Schwartz, *Judge Rules that FDA Can Regulate Tobacco*, WASH. POST, Apr. 26, 1997, at A1.

¹⁴ "[T]he effects of the mass media are a major concern in our society—a concern, incidentally, that has existed since the beginning of mass communication when monarchs and religious leaders stifled printing to curb political dissent, reform, and new ideas that threatened the established order." JAMES WILSON AND STAN LE ROY WILSON, *MASS MEDIA/MASS CULTURE* 407-08 (4th ed. 1998).

¹⁵ See Albert C. Gunther & Paul Mundy, *Biased Optimism and the Third-Person Effect*, 70 JOURNALISM Q. 58, 58 (1993).

¹⁶ See Davison, *supra* note 1, at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Vincent Price et al., *Third-Person Effects of News Coverage: Orientations Toward Media*, 74 JOURNALISM & MASS COMM. Q. 525, 525 (1997) (stating that the third-person effect "has been well documented by more than a decade of empirical study").

²⁰ See Albert C. Gunther, *Overrating the X-Rating: The Third-Person Perception and Support for Censorship of Pornography*, J. COMM., Winter 1995, at 27, 35.

²¹ See *id.* at 36.

²² See *id.* at n.10. See also Hernando Rojas et al., *For the Good of Others: Censorship and Third Person Effect*, 8 INT'L J. PUB. OPINION RES. 163, 182 (1996) (reporting the results of an empirical study on the third person effect and concluding that "[a] significant part of the apprehension caused by media effects results from the overestimation of its effects on others"). An alternative explanation, of course, would be that people underestimate the actual influence on themselves while they accurately estimate the influence on others. Research, however, rebuts this self-underestimation explanation, with Douglas M. McLeod of the University of Delaware and his colleagues observing that "[f]or the most part, the literature indicates that people do in fact overestimate the effects of media content on others." Douglas M. McLeod et al., *Support for Censorship of Violent and Misogynistic Rap Lyrics*, 24 COMM. RES. 153, 155 (1997).

²³ Gunther, *supra* note 20, at 37.

The finding is not limited, however, to pornographic speech. Recent empirical research also supports the third-person effect hypothesis in the context of perceptions about harm caused by—and the need for censorship of—rap music.²⁴ Douglas M. McLeod of the University of Delaware and his colleagues conducted a survey on the relationship between third-person effects and censorship of rap lyrics.²⁵ They found both that participants in the study perceived others to be more influenced by rap lyrics and that “this perception was strongly related to support for censorship, even after controlling for other important variables.”²⁶ In particular, McLeod and his colleagues found that the “impact of third-person perceptions on support for censorship was strong despite controlling for several correlates of censorship (gender, conservatism, social desirability of the content and knowledge of and liking of the content in question).”²⁷ They conclude “[i]f it is the case (as research seems to indicate) that third-person perceptions are based on an overestimation of effects on others, the desire for censorship caused by third-person perceptions is built on a flawed foundation. Any censorship that results from misperceptions may in fact be unnecessary censorship.”²⁸

Other research suggests, in the context of defamation by the media, people may overestimate the extent of reputational injury caused by a defamatory statement and, as a result, overcompensate plaintiffs with excessive monetary damages.²⁹ Inflated awards against the press that often cause a chilling effect on investigative reporting, in other words, may be based on biased perceptions and assumptions.³⁰

In summary, our false assumptions about media effects may lead to legislation and jury verdicts in a wide range of areas that erroneously punish freedom of expression. That is the profound danger of legal scholars and legislators who choose to ignore—or who simply are unaware of—the growing body of social science research on the third-person effect.

Bridging social science and law, this interdisciplinary article initially explains the third-person effect and presents an overview of some of the research conducted to date that has been published in peer-reviewed social science journals.³¹ The article then explores the implications of this research for First Amendment jurisprudence.³²

Although it is clear that “[l]aw is not lame without social science[,]”³³ communication science “may play an important role in the development of legal theory.”³⁴ Largely ignored by First Amendment scholars until now,³⁵ the third-person effect research requires legal attention—it suggests that judges, legislators, and juries may be overestimating the harmful effects of mass communication messages and, as a result, unnecessarily censoring and punishing individuals and entities for their speech.³⁶

I. THE THIRD-PERSON EFFECT

The third-person effect, in a nutshell, “predicts that people perceive greater persuasive media influence on other people than on themselves.”³⁷ It seems to be “one variant of a general belief that the outcomes of some event will be more unfavorable at the societal level (for other people) than at the personal level (for me).”³⁸ It is a “percep-

²⁴ See McLeod et al., *supra* note 22, at 165.

²⁵ See *id.* at 160-61.

²⁶ *Id.* at 165.

²⁷ *Id.* at 168.

²⁸ See *id.* at 165.

²⁹ See Jeremy Cohen et al., *Perceived Impact of Defamation: An Experiment on Third-Person Effects*, 52 PUB. OPINION Q. 161, 172 (1988).

³⁰ See generally David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975) (describing the impact of large damage awards in libel cases on journalism).

³¹ See *infra* Part I.

³² See *infra* Part II.

³³ JEREMY COHEN & TIMOTHY GLEASON, *SOCIAL RESEARCH IN COMMUNICATION AND LAW* 110 (1990).

³⁴ *Id.* at 109. Social science data used to inform legislative judgment in making laws are called “legislative facts.” JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 143 (3d ed. 1994) (citing Kenneth

Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, HARV. L. REV. 364, 402 (1942)).

³⁵ The third-person effect research has been mentioned briefly in passing in only two law journal articles. See Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 26 PAC. L.J. 933, 937 n.31 (1995); David McCraw, *How Do Readers Read? Social Science and the Law of Libel*, 41 CATH. U. L. REV. 81, 92 (1991).

³⁶ See Price et al., *supra* note 19 (stating that the “tendency to perceive that other people are more greatly influenced by the media than ourselves could well have important consequences” including “even legal ramifications”).

³⁷ Paul D. Driscoll & Michael B. Salwen, *Self-Perceived Knowledge of the O.J. Simpson Trial: Third-Person Perception and Perceptions of Guilt*, 74 JOURNALISM & MASS COMM. Q. 541, 551 (1997).

³⁸ L. Erwin Atwood, *Illusions of Media Power: The Third-Person Effect*, 71 JOURNALISM Q. 269, 279 n.1 (1994).

tual phenomenon"³⁹ that is based on "inferential biases [in] the assignment of mass media effects."⁴⁰

Today, a large number of studies provide "abundant support for the notion that individuals assume that communications exert a stronger influence on others than on themselves."⁴¹ What's more, a "significant part of the apprehension caused by media effects results from the overestimation of its effects on others."⁴² The remainder of this Part of the article elaborates on the third-person effect and some of the research conducted that illustrates and explains its existence.

A. Components of the Third-Person Effect

The third-person effect hypothesis has two components—a perceptual bias and a behavioral response in conformity with that perceptual bias.⁴³ The perceptual bias—that people will estimate effects of media messages on themselves to be less than the effects on others—has considerable empirical support.⁴⁴ A 1993 review by Richard Perloff of the third-person research conducted from 1983 through 1992 revealed support for the perceptual bias component of the third-person effect in 13 of 14 studies.⁴⁵

In his seminal work on the third-person hypothesis, Davison used an anecdote to illustrate the perceptual bias.⁴⁶ He asked journalists a series of questions about how much they thought their newspaper editorials had influenced the thinking of their readers.⁴⁷ Davison was struck by "the extent to which many journalists were convinced that editorials had an effect on other people's attitudes, while discounting the effect on people like themselves."⁴⁸ This personal observation and others led to his formation of the third-person effect hypothesis.⁴⁹

This perceptual bias may relate in some circum-

stances to what has been called biased optimism.⁵⁰ Biased optimism is "the tendency for people to think they are less likely to have negative or undesirable experiences than others."⁵¹ This is a form of ego enhancement, and research suggests that people attribute particularly savvy responses to themselves to bolster their own sense of competence and self-worth.⁵²

The research also suggests that the perceptual bias component of the third-person effect is greater when message content is deemed to be negative.⁵³ Positive or desirable messages, on the other hand, are less likely to elicit the third-person effect.⁵⁴ This suggests that people who perceive particular media messages as harmful or negative are more likely to be subject to the third-person effect with regard to the impact of those messages. In a nutshell, "it seems that messages considered harmful, dangerous, or more broadly, schema discrepant, are those most likely to elicit the third-person effect in communication."⁵⁵ In addition, individuals who are more involved in a topic—who have stronger views—are more predisposed to the third-person effect.⁵⁶

The danger for censorship arises when the perceptual bias is linked with a behavioral component—that biased perceptions of media effects result in behavior, such as laws and regulations, intended to protect the public from the perceived negative effects of media messages.⁵⁷ As McLeod and his colleagues state, "few media researchers would dispute the importance of a perceptual bias that leads to support for censorship."⁵⁸

Although there is less support for the behavioral component, three empirical studies published in the past three years have found support for it in the areas of censorship of pornography, television violence, and rap lyrics.⁵⁹ These, of course, are three of the hottest areas today in which regulations have either been called for or

³⁹ Price et al., *supra* note 19.

⁴⁰ Atwood, *supra* note 38, at 270.

⁴¹ Rojas et al., *supra* note 22, at 165.

⁴² *Id.* at 182.

⁴³ See McLeod et al., *supra* note 22, at 154.

⁴⁴ *See id.*

⁴⁵ See Richard M. Perloff, *Third-Person Effect Research 1983-1992: A Review and Synthesis*, 5 INT'L J. PUB. OPINION RES. 167 (1993).

⁴⁶ See Davison, *supra* note 1, at 2.

⁴⁷ *See id.*

⁴⁸ *Id.*

⁴⁹ *See id.* at 3.

⁵⁰ See Gunther & Mundy, *supra* note 15, at 60.

⁵¹ *Id.*

⁵² *See id.* at 66-67. Gunther and Mundy found "that while the third-person phenomenon is indeed a robust effect, it results at least in part from people's tendency toward an optimistic bias in making judgments about the differences between themselves and others." *Id.* at 66.

⁵³ See Rojas et al., *supra* note 22, at 166.

⁵⁴ *See id.*

⁵⁵ *Id.* at 167.

⁵⁶ See Price et al., *supra* note 19, at 526.

⁵⁷ See McLeod et al., *supra* note 22, at 154-55, 157.

⁵⁸ *Id.* at 168.

⁵⁹ See Gunther, *supra* note 20, at 36; See McLeod et al., *supra* note 22, at 168; See Rojas, et al., *supra* note 22, at 182.

enacted. On the other hand, another study found a lack of empirical support for the behavioral component of the third-person effect in the context of calls for restricting press coverage of criminal trials.⁶⁰

The fact that a trio of recent studies supports the behavioral component—namely, calls for censorship—of the third-person effect cannot be ignored. Future replications of these studies may confirm the earlier findings of the link between the perceptual bias and behavioral response to that bias. As noted above, individuals are more predisposed to the third-person effect when messages are perceived as having negative consequences.⁶¹ People have long perceived media portrayals of violence and pornography as having negative consequences.⁶² Thus it is not surprising to find the existence of a third-person effect in these areas, and it would not be surprising to find such an effect in other areas involving “negative” messages such as cigarette and alcohol advertising.⁶³

B. Some Limitations on the Research Findings

Whether the third-person perception actually causes censorship is not something that social science research can definitively prove. John Monahan and Laurens Walker write in *Social Science in Law* “that social science research (or, indeed, research in any other area of science, including physics) never ‘proves’ anything in the sense of concluding that any assertion is absolutely true or absolutely false. Rather, it assigns a probability to the truth or falsity of assertions that are tested.”⁶⁴ Statistical procedures can only determine the probability that an observed difference or change noted in a experiment or survey was caused by chance.⁶⁵ When researchers state that their findings achieved statistical significance, this “does not *prove* that the variables being inves-

tigated caused the difference, it only says that the difference exists and is probably not just a random occurrence.”⁶⁶ The survey data used to demonstrate the relationship between a perceptual bias and calls for censorship thus can at best show a correlation but not causation.

Despite these limitations, the empirical data are there for legal scholars and legislators to consider. The next part of this article argues that the data should not, at the very least, be ignored by those who advocate censorship of mass media messages because of their supposedly harmful consequences.

II. LEGAL RAMIFICATIONS

The legal ramifications of the third-person research are profound. We may be censoring and punishing speech conveyed by the mass media unnecessarily and without justification. As Hernando Rojas and his colleagues observed recently in the *International Journal of Public Opinion Research*, “If part of the drive to curtail certain types of messages results from the third-person effect, policy debates have to recognize this and concentrate on measuring *actual* media effects and not *perceived* media effects.”⁶⁷

Unfortunately, there is no debate in the legal community about this issue. Legal scholars and legislators have ignored the crucial body of social science research on the third-person effect. Calls for censorship, instead, are based largely on hunches and assumptions about media effects that are tainted by perceptual biases. Most disturbingly, the research is ignored at a time when censorship has become one of the most salient issues in American society.⁶⁸

Censorship, of course, “is a social instinct.”⁶⁹ Media messages, in turn, have long been a target of this social instinct.⁷⁰ Motion pictures were targeted as far back as the 1920s for their alleg-

⁶⁰ See Michael B. Salwen & Paul D. Driscoll, *Consequences of Third-Person Perception in Support of Press Restrictions in the O.J. Simpson Trial*, J. COMM., Spring 1997, at 60, 72. This study, however, used the O.J. Simpson case—a truly aberrant criminal matter—as its focus.

⁶¹ See *supra* note 53 and accompanying text.

⁶² See Leon Friedman, *Symposium Introduction*, 22 HOFSTRA L. REV. 775, 776-77 (1994).

⁶³ See Rojas et al., *supra* note 22, at 182-83 (suggesting the third-person effect may be applicable to a number of advertising issues including ads for potentially harmful products).

⁶⁴ MONAHAN & WALKER, *supra* note 34, at 79.

⁶⁵ See *id.*

⁶⁶ THOMAS R. BLACK, *EVALUATING SOCIAL SCIENCE RESEARCH: AN INTRODUCTION* 11 (1993).

⁶⁷ Rojas et al., *supra* note 22, at 182 (emphasis added).

⁶⁸ See Richard Hense & Christian Wright, *The Development of the Attitudes Toward Censorship Questionnaire*, 22 J. APPLIED. SOC. PSYCHOL. 1666 (1992). “[F]ree speech is in more trouble today than it has been in decades.” Kathleen Peratis, *Banning Speech Does Not Cure Social Ills*, 22 HOFSTRA L. REV. 801, 803 (1994).

⁶⁹ SMOLLA, *supra* note 3, at 4.

⁷⁰ “[T]he mass media have the potential to influence au-

edly harmful effects on children⁷¹ and, in fact, once were not recognized by the United States Supreme Court as a form of protected speech under the First Amendment.⁷² During the 1980s, books were "the most challenged form of expression."⁷³ Today, "[t]elevision is perhaps the favorite target of powerful effects critics . . . [and] video games are a close second favorite."⁷⁴

Our social instincts about the direct and powerful effects of the media, however, are extremely naive. Communication researchers long ago rejected what has been described as the magic bullet theory or hypodermic needle theory of direct, powerful, and largely uniform media effects on audience members.⁷⁵ Despite this fact, many people still believe that media messages can have direct and powerful effects on an essentially passive audience.⁷⁶ In brief, the bullet theory held that "[m]essages only had to be loaded, directed at the target and fired; if they hit the target audience, then the expected response would be forthcom-

ing."⁷⁷

Communication is, of course, a much more complex process with any number of variables and contingent conditions influencing the ultimate impact of a message on the recipient.⁷⁸ Media messages certainly do have effects, but they are not all-powerful as we often assume.⁷⁹ Their impact may be mediated by factors such as selective perception,⁸⁰ involvement,⁸¹ and source credibility.⁸² In brief, "the statement that 'it depends' is an accurate description of the answer to many questions about media effects."⁸³

The problem for the law and freedom of expression is clear. When the third-person effect is coupled with our simplistic assumptions about the power of the media, we censor speech because we assume that it causes harm, regardless of whether it really does.⁸⁴ We assume causation of injury from speech based on instincts tarnished by perceptual biases.

Politicians are increasingly driven by numbers

dience behavior, and throughout the years there has been an expression of social concern over the extent of this power. . . . some of this concern has been reflected in formal and informal controls over the media." JOSEPH R. DOMINICK, *THE DYNAMICS OF MASS COMMUNICATION* 548 (5th ed. 1996).

⁷¹ SHEARON A. LOWERY & MELVIN L. DEFLEUR, *MILESTONES IN MASS COMMUNICATION RESEARCH* 23-24 (3d ed. 1995).

⁷² See *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230, 244 (1915). Motion pictures did not receive First Amendment protection as speech until 1952. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

⁷³ JOHN B. HARER & STEVEN R. HARRIS, *CENSORSHIP OF EXPRESSION IN THE 1980s* 123 (1994).

⁷⁴ JAY BLACK ET AL., *INTRODUCTION TO MEDIA COMMUNICATION* 38 (5th ed. 1998).

⁷⁵ See WERNER J. SEVERIN & JAMES W. TANKARD, JR., *COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA* 247 (3d ed. 1992).

⁷⁶ See *id.*

⁷⁷ BLACK ET AL., *supra* note 74, at 38. It has been suggested that the bullet theory was really never adopted by communication researchers but merely a straw-man theory set up for purposes of comparison. See Steven H. Chaffee & John L. Hochheimer, *The Beginnings of Political Communication Research in the United States: Origins of the "Limited Effects" Model*, in *THE MEDIA REVOLUTION IN AMERICA AND IN WESTERN EUROPE* 267 (Everett M. Rogers & Francis Balle eds. 1985).

⁷⁸ See Jeremy Cohen & Albert C. Gunther, *Libel as Communication Phenomena*, *COMM. & LAW*, OCL 1987, at 9, 27 (observing that communications "researchers view communication as a process containing a series of steps within complex interactions among people. Normally, people neither receive, nor act on, communication in a void.").

⁷⁹ The media, for instance, are very effective in setting the public's agenda—telling people what issues are salient and worthy of discussion. See Maxwell E. McCombs & Donald L. Shaw, *The Evolution of Agenda-Setting Research: Twenty-Five*

Years in the Marketplace of Ideas, *J. COMM.*, Spring 1993, at 58. On the other hand, one social scientist who has reviewed the literature and research on television violence concludes "that early childhood viewing of mass media violence contributes [only] five to ten percent to adult aggressive behavior." Edward Donnerstein, *Mass Media Violence: Thoughts on the Debate*, 22 *HOFSTRA L. REV.* 827, 829 (1994).

⁸⁰ See MELVIN L. DEFLEUR & SANDRA J. BALL-ROKEACH, *THEORIES OF MASS COMMUNICATION* 196-97 (5th ed. 1989) (observing that "the principle of selective perception is that people of distinct psychological characteristics, subcultural orientations, and social network memberships will interpret the same media content in very different ways").

⁸¹ See Steven H. Chaffee & Connie Roser, *Involvement and the Consistency of Knowledge, Attitudes, and Behaviors*, 13 *COMM. RES.*, 373, 376 (1986) (observing that the concept involvement as a contingent condition governing mass media effects has been a part of communication research since 1965).

⁸² See generally RICHARD E. PETTY & JOHN T. CACIOPPO, *ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES* 61-65 (describing the concept of source credibility and its ability to influence the impact of media messages).

⁸³ SEVERIN & TANKARD, *supra* note 75, at 265. "Contemporary analyses of mass media persuasion have focused on the variables that determine when the media will be effective versus ineffective and what the underlying processes are by which the media induce change." Richard E. Petty & Joseph R. Priester, *Mass Media Attitude Change: Implications of the Elaboration Likelihood Model of Persuasion*, in *MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH* 91, 94 (Jennings Bryant & Dolf Zillmann eds., 1994).

⁸⁴ Assumption of injury from speech is involved in the traditional "bad tendency" justification for penalizing speech. See David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 *YALE L.J.* 514, 543 (1981). Likewise, libel law traditionally has presumed harm from defamatory speech without proof of actual injury. See David A. Anderson, *Reputation, Compensation, and Proof*, 25 *WM. & MARY L. REV.* 747, 748 (1984).

from public opinion polls when they propose and craft legislation.⁸⁵ If the public opinion that they follow is susceptible to the influences of the third-person effect when it comes to the impact of mass media messages, an entire body of legislation may be created that unnecessarily restricts expression.

Michael Schudson observes that "[t]he assumption that gullible others, but not one's own canny self, are slaves to the media is so widespread that the actions based on it may be one of the mass media's most powerful creations."⁸⁶ Going one step further, our biased assumptions of the media's influence affect our restrictions of First Amendment freedoms of speech and press. Ultimately, the "consequences are costly when actions, based on inaccurate perceptions of the opinions of others, take on the force of law."⁸⁷

Legal scholars, legislators, and judges, of course, are welcome to consider legal issues of free speech in a vacuum that ignores real-world data about media effects. To do so, however, would be a grave mistake. Free speech is too valu-

able to be suppressed because of ill-formed assumptions about the power of media messages. The third-person effect literature, in turn, provides helpful context for legislators who react to public opinion polls and their perceptions about how other people are influenced by the media. It can provide the kind of "enlightened skepticism" about our current rules and restrictions on speech that former United States Supreme Court Justice Oliver Wendell Holmes found so valuable to the development of the law.⁸⁸

In summary, our perceptual biases about media harms may create and perpetuate entire areas of law that are both unnecessary and unfounded. They should not. As Abraham Kaplan wrote more than thirty years ago, it "is absurd to make claims about matters which depend on evidence and yet ignore the scientific attempt to get the evidence."⁸⁹ There must be, in other words, a "transaction between social science and social policy."⁹⁰ The research on the third-person effect must be part of that transaction.

⁸⁵ See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 63 (observing that "[p]oliticians are to some extent influenced by public opinion, and they should be"). Some studies have suggested that politicians "are motivated to action based on their beliefs about the public's reactions to media messages." Salwen & Driscoll, *supra* note 60, at 62. During the 1992 presidential election campaign, for instance, Bill Clinton "followed what the polls told him, and did well by being a good populist." EDWIN DIAMOND & ROBERT A. SILVERMAN, *WHITE HOUSE TO YOUR HOUSE: MEDIA AND POLITICS IN VIRTUAL AMERICA* 125 (1995).

Today, "no one doubts the importance of polling and other forms of 'interactivity' in the Clinton White House." *Id.* at 126.

⁸⁶ MICHAEL SCHUDSON, *THE POWER OF NEWS* 121 (1995).

⁸⁷ Cohen et al., *supra* note 29, at 173.

⁸⁸ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁸⁹ Abraham Kaplan, *Behavioral Science and the Law*, 19 CASE W. RES. L. REV. 57, 67 (1967).

⁹⁰ RICHARD P. NATHAN, *SOCIAL SCIENCE IN GOVERNMENT: USES AND MISUES* 4 (1988).

